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No. 08-414

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

CENTURYTEL, INC.,

Petitioner,

v.

BARBRASUE BEATTIE and JAMES SOVIS,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the petition sets forth any compelling reasons to review the Sixth Circuit's decision holding that the district court acted within its discretion in entering an interlocutory order certifying a class of consumers for claims against their telephone company for unjust and unreasonable billing practices in violation of the Federal Communications Act of 1934, 47 U.S.C. § 151 *et seq.*

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Respondents Barbrasue Beattie and James Sovis (collectively, "respondents"), plaintiffs below, hereby oppose the petition for a writ of certiorari. None of the reasons advanced by Petitioner CenturyTel, Inc. ("CenturyTel" or "petitioner"), defendant below, support the Court's review of the court of appeals' decision to affirm, in part, and remand, in part, the district court's class certification order.

First, and most importantly, this petition relates to the district court's interlocutory order granting, in part, respondents' motion for class certification. On appeal pursuant to Fed. R. Civ. P. 23(f), the Sixth Circuit held that the district court acted within its discretion in certifying a class and remanded the matter for further proceedings. As such, this appeal of an interlocutory procedural ruling is not a good vehicle for the Court to address, as petitioner requests, the nature of the proofs necessary to establish a claim under the Federal Communications Act of 1934 ("Communications Act"), 47 U.S.C. § 151 *et seq.* As CenturyTel readily acknowledges in its petition, the district court already concluded that CenturyTel violated 47 U.S.C. § 201(b) and "CenturyTel does not here challenge that ruling." Pet. 7-8. Before engaging in any further appellate review, the litigation in the district court should be permitted to proceed to a final judgment. "[T]his Court above all others must limit its review of interlocutory orders." *Goldstein v. Cox*, 396 U.S. 471, 478 (1970).

Second, the conduct that resulted in this litigation is unlikely to reoccur. Petitioner is a telephone service provider that systematically billed its customers for an optional inside wire maintenance plan (called

"WireWatch") under the description "Non-Regulated Services." The Federal Communications Commission ("FCC") has made it clear that "a charge described by what it is not" is "inherently ambiguous and does not disclose sufficient information." *In the Matter of Truth-in-Billing and Billing Format, First Report and Order and Further Notice of Proposed Rulemaking, In the Matter of Truth-In-Billing and Billing Format,* 14 F.C.C.R. 7492, at 7518 (F.C.C. Apr. 15, 1999). Petitioner itself purportedly ceased its practice of billing for WireWatch as "Non-Regulated Services" in January 2002. Given the clarity of the FCC's position on the specific challenged practice, it is unlikely that any telecommunications company would use similar billing language today. Therefore, a ruling by this Court on class certification issues is unlikely to have a material impact on any telecommunication industry billing practices taking place now or in the future.

Third, there is no conflict among the circuits. Petitioner's contention that the Sixth Circuit's decision is in conflict with *Conboy v. AT&T Corp.*, 241 F.3d 242 (2d Cir. 2001), is specious. *Conboy* was filed as a class action, including claims for violation of Section 222 of the Communications Act, 47 U.S.C. § 222, but class certification was never addressed. The case was instead dismissed pursuant to Fed. R. Civ. P. 12(b)(6) for failure to state a claim. Thus, *Conboy* involved an appeal from a final judgment that was subjected to *de novo* review by the Second Circuit. The Sixth Circuit's decision below, in contrast, held that the district court did not abuse its discretion in certifying a class for truth-in-billing claims pursuant to Section 201(b).

Finally, respondents respectfully submit that the Sixth Circuit's interpretation of Section 206 of the Communications Act, 47 U.S.C. § 206, was correct and appropriate. Even if the Sixth Circuit had misapplied the statute in the class context, however, any further appellate proceedings should await a final judgment on the merits. *See* Sup. Ct. R. 10.

These considerations all weigh against further appellate review of the district court's interlocutory order by this Court.

COUNTERSTATEMENT OF THE CASE

On October 28, 2002, respondents commenced this action against CenturyTel after discovering that they and other CenturyTel telephone customers had been unlawfully billed, and had paid such unlawfully billed charges, for WireWatch. Respondents allege that CenturyTel's systematic practice of billing customers a small monthly fee for WireWatch under the label "Non-Regulated Services" constituted "unjust and unreasonable" billing practices in violation of Section 201(b) of the Communications Act, 47 U.S.C. § 201(b), and the FCC's related truth-in-billing and Billing Format regulations, 47 C.F.R. § 64.2401.[1]

Beginning in at least 1994, CenturyTel's telephone billings to respondents and other residential telephone customers included a monthly charge, generally ranging

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1. Respondents allege additional federal and state law claims that are not at issue in connection with this petition.

from $0.50 to $0.99, described in a line item on the bills as "Non-Regulated Services." As reflected in an excerpt from one of respondent Beattie's telephone bills, these charges were presented by CenturyTel in the following manner:

MONTHLY SERVICE DETAIL		
LOCAL SERVICE IN ADVANCE FROM XXX TO XXX	$ 15.55	
SUBSCRIBER LINE CHARGE – INTER	3.50	
SUBSCRIBER LINE CHARGE - INTRA	3.50	
NON-REGULATED SERVICES	*.99*	
OTHER CHARGES	.07	
MONTHLY SERVICE AMOUNT FOR XXX-XXX-XXXX	23.61	
TOTAL MONTHLY SERVICE AMOUNT		23.61
FEDERAL TAX	.68	
STATE TAX	1.41	
911 EMERGENCY SYSTEM	.23	
911 OPERATIONAL SYSTEM	2.01	
TOTAL OF TAXES		4.33
TOTAL CenturyTel		27.94

(Emphasis added.)

In May 2001, CenturyTel increased the charge for WireWatch to $3.95, which it continued to bill under the line item description "Non-Regulated Services." It was not until January 2002 that CenturyTel reorganized its billing format and changed the line item description to reflect that the billed charges were actually for "Inside Wire Maint. Plan." It was this change in CenturyTel's billing format and description that finally allowed consumers to recognize that the charge for "Non-Regulated Services" was actually a charge for WireWatch. In their complaint, respondents allege that: (1) by billing for WireWatch along side customers' regulated telephone transmission charges; (2) by billing for WireWatch under the description "Non-Regulated Services" and under the heading "Monthly Service Detail;" and (3) by keeping the monthly fee relatively low (*i.e.*, $0.50 to $3.95), CenturyTel engaged in "unjust and unreasonable" billing practices in violation of Section 201(b) of the Communications Act and 47 C.F.R. § 64.2401.

Respondents moved for class certification. On March 10, 2006, the district court denied the request to certify a mandatory class under Fed. R. Civ. P. 23(b)(1) and (b)(2), but certified an opt-out class under Rule 23(b)(3), albeit with a substantially narrowed class definition and limited to the unlawful billing claim. App. 44a-57a.[2]

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2. The district court defined the class as: "All persons who have paid CenturyTel, Inc. for charges for an inside wire maintenance insurance program described in CenturyTel's residential telephone bills as "Non-Regulated Services" during the period beginning October 29, 2000, or such earlier period if

(Cont'd)

The district court also granted respondents' motion for partial judgment on the pleadings, concluding that, "based on the allegations and admissions in the pleadings" (including CenturyTel's answer), CenturyTel's practice of billing charges for WireWatch under the description "Non-Regulated Services" was an unjust and unreasonable billing practice that violated 47 U.S.C. § 201(b), as a matter of law. App. 57a-63a. Petitioner has not sought to appeal the district court's ruling that CenturyTel is liable under the Communications Act to persons who paid for WireWatch pursuant to such unlawful billings.

On May 2, 2006, the Sixth Circuit granted CenturyTel's Fed. R. Civ. P. 23(f) petition for leave to bring an interlocutory appeal of the class certification order. On December 18, 2007, the Sixth Circuit upheld class treatment for respondents' unlawful billing claims under the Communications Act. App. 1a. The court stated, in part, as follows:

> [U]nder § 206, Plaintiffs-Appellees must establish that each class member was injured by CenturyTel's violation of § 201(b). 47 U.S.C. § 206 (stating that a "common carrier shall be liable to the person or persons

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(Cont'd)

the charges were not know[n] or reasonably could [not] have been known by October 29, 2000; but excluding CenturyTel; its subsidiaries, affiliates, officers and directors; any entity in which CenturyTel has a controlling interest; and the legal representatives, heirs, successors and assigns of any such excluded party." App. 66a.

injured" by its unlawful practice). *This can be done by showing that each class member paid for WireWatch during the period when the service was billed under the misleading description.* Before the district court, CenturyTel admitted that "it did send some bills to customers that contained this language," *Beattie*, 234 F.R.D. at 173, and an inventory of CenturyTel's billing records could disclose which customers paid their bills in full, which would include a payment for fees associated with WireWatch. On appeal, CenturyTel argues that "only those customers who can establish that they did not want or request the WireWatch service can establish CenturyTel's liability. . . ." (Appellant's Br. 40.)

CenturyTel is incorrect. Under § 206, CenturyTel is liable if it violated § 201(b), which makes it unlawful for CenturyTel to bill for a service under a misleading description, even where the customer requested the service. *See* 47 C.F.R. § 64.2401(b) ("The description must be sufficiently clear in presentation and specific enough in content so that customers can accurately assess that the services for which they are billed correspond to those that they have requested and received. . . ."). True, each class member will have to show that she did not enroll in WireWatch, but that is relevant, as the district court concluded, to the issue of damages and not liability. Thus, Plaintiffs-Appellees should be able to establish liability for the class as a

> whole because the misleading description used by CenturyTel violated § 201(b), and *class members were injured by that violation when they paid their telephone bill, which included a charge for WireWatch under a misleading description (a § 206 violation).*

App. 23a-24a (emphasis added).

The litigation in the district court has continued throughout the interlocutory appeal process and remains active today. On June 7, 2006, the district court denied petitioner's emergency motion to stay proceedings pending the decision by the Sixth Circuit. Thereafter, the parties continued with discovery, and multiple discovery motions were filed and resolved by the district court.

On June 18, 2008, the Sixth Circuit denied petitioner's Motion for Stay of Mandate Pending Filing of a Petition for a Writ of Certiorari. The district court has since complied with the Sixth Circuit's directive to address on remand the possible certification of respondents' remaining state law claim by denying, without prejudice and with leave to re-file, respondents' request to certify the class with respect to claims for unjust enrichment. The parties continue to engage in discovery, with deposition discovery commencing in late October 2008.

REASONS FOR DENYING THE PETITION

The petition advances no compelling reason that warrants review of the Sixth Circuit's decision below. This appeal concerns an interlocutory order, reviewed by the Sixth Circuit under an abuse of discretion standard, that involves underlying factual conduct that is unlikely to reoccur. There is no conflict among circuits in need of resolution. And even if the Sixth Circuit had misapplied Section 206 (respondents respectfully submit that it did not), any further appellate review should await a final judgment on the merits.

I. THIS COURT RARELY REVIEWS INTERLOCUTORY RULINGS.

This appeal of an interlocutory, procedural order does not present a good opportunity for the Court to address the nature of the proofs necessary to establish a claim under Section 206 of the Communications Act. Class certification rulings are "inherently interlocutory," *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 470 (1978), and this Court has historically been reluctant to review interlocutory orders. *See Goldstein v. Cox*, 396 U.S. 471, 478 (1970) ("[T]his Court above all others must limit its review of interlocutory orders."); *Brotherhood of Locomotive Firemen & Enginemen v. Bangor & Aroostook A. R. Co.*, 389 U.S. 327, 328 (1967) (per curiam) ("[B]ecause the Court of Appeals remanded the case, it is not yet ripe for review of an interlocutory order."). As the Court explained in *Firestone Tire & Rubber Co. v.*

Risjord, 449 U.S. 368 (1981), the "final judgment rule" serves several salutary purposes:

> It emphasizes the deference that appellate courts owe to the trial judge as the individual initially called upon to decide the many questions of law and fact that occur in the course of a trial. Permitting piecemeal appeals would undermine the independence of the district judge, as well as the special role that individual plays in our judicial system. In addition, the rule is in accordance with the sensible policy of avoid[ing] the obstruction to just claims that would come from permitting the harassment and cost of a succession of separate appeals from the various rulings to which a litigation may give rise, from its initiation to entry of judgment. The rule also serves the important purpose of promoting efficient judicial administration.

Id., at 374 (citations and internal quotation marks omitted).[3]

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3. *See also Johnson v. Jones*, 515 U.S. 304, 309 (1995) (An interlocutory appeal threatens "delay, adding costs and diminishing coherence. It also risks additional, and unnecessary, appellate court work either when it presents appellate courts with less developed records or when it brings them appeals that, had the trial simply proceeded, would have turned out to be unnecessary.") (citations omitted); 19 James Wm. Moore, Moore's Federal Practice § 201.10[1] (3d ed. 2008) ("The (Cont'd)

In 1998, the Court promulgated Fed. R. Civ. P. 23(f) as a narrow exception to the general rule against piecemeal appeals. *See In re Delta Air Lines*, 310 F.3d 953, 959 (6th Cir. 2002) ("[T]he Rule 23(f) appeal is never to be routine."); *Chamberlan v. Ford Motor Co.*, 402 F.3d 952, 955 (9th Cir. 2005) ("We begin with the premise that Rule 23(f) review should be a rare occurrence."). In particular, there is a short time limit—10 days—within which the aggrieved party can ask the court of appeals to exercise its discretion. *See* Fed. R. Civ. P. 23 advisory committee's note, 1998 Amendments, Subdivision (f) ("The 10-day period for seeking permission to appeal is designed to reduce the risk that attempted appeals will disrupt continuing proceedings."); *In re Lorazepam & Clorazepate Antitrust Litig.*, 289 F.3d 98, 105 (D.D.C. 2002) ("Delay caused by interlocutory appeals under Rule 23(f) may be less of a concern because filing a petition does not automatically stay the litigation") (citation omitted). In exercising their discretion, courts of appeals have remained cognizant of the fact that "[t]hese appeals add to the heavy workload of appellate courts, require consideration of issues that may become moot, and undermine the district court's ability to manage the class action." *Chamberlan*, 402 F.3d at 959.

(Cont'd)
purposes of the final judgment rule are to avoid piecemeal litigation, to promote judicial efficiency, and to defer to the decisions of the trial court. Unfettered interlocutory appeals would disrupt both the trial and appellate processes.").

Despite an avalanche of Rule 23(f) applications over the past decade, petitioner has not cited — and respondents have not located — a single instance where the Court has accepted review of such an appeal.[4] The petition also fails to raise a serious question concerning generally applicable Rule 23 standards that might warrant review by this Court. *Compare Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 619 (1997) (the Court "granted review to decide the role settlement may play, under existing Rule 23, in determining the propriety of class certification.").[5]

Instead, petitioner asks this Court to address the injury and causation requirements of Section 206, but a Rule 23(f) appeal is not a good vehicle for the Court to consider the substantive scope and parameters of underlying claims that are not yet the subject of a final judgment. Petitioner notes that the district court "determined that CenturyTel's billing description for WireWatch as Non-Regulated Services violated 47 U.S.C. § 201(b). App. 67a. CenturyTel does not here challenge that ruling." Pet. 7-8. Petitioner does not challenge that ruling because it *cannot* challenge that ruling; it is not the subject of a final judgment, nor has

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4. *See, e.g.*, *Regents of University of California v. Credit Suisse First Boston (USA), Inc.*, 482 F.3d 372 (5th Cir. 2007), *cert. denied*, __ U.S. __, 128 S. Ct. 1120 (2008); *Olden v. LaFarge Corp.*, 383 F.3d 495 (6th Cir. 2004), *cert. denied*, 545 U.S. 1152 (2005); *Klay v. Humana, Inc.*, 382 F.3d 1241 (11th Cir. 2004), *cert. denied*, 543 U.S. 1081 (2005); *Carnegie v. Household Intern., Inc.*, 376 F.3d 656 (7th Cir. 2004), *cert. denied*, 543 U.S. 1051 (2005).

5. *Amchem* arose prior to promulgation of Rule 23(f) and involved an appeal from a final judgment.

it been certified for interlocutory appeal pursuant to 28 U.S.C. § 1292(b).

The Court should not expend its limited resources interpreting the nature and scope of a statutory claim in circumstances where the Court is not required to reach the merits of the claim. *See Delta Airlines*, 310 F.3d at 960 ("The Rule 23(f) appeal should not become a vehicle for early review of a legal theory that underlies the merits of a class action"). As this is also one of the rare cases where review of an interlocutory class certification order has been allowed, four federal judges (*i.e.*, the district judge and a unanimous panel of the Sixth Circuit) have now weighed in on the propriety of class certification. That is sufficient interlocutory review at this time. Further appellate review, if any, should follow a final judgment in the ordinary course.

II. THE UNDERLYING FACTUAL EVENTS ARE UNLIKELY TO REOCCUR.

In addition to the interlocutory nature of this appeal, this case is not a good vehicle for further addressing, or offering advance guidance on, telecommunication industry billing practices. In adopting the truth-in-billing regulation (47 C.F.R. § 64.2401), the FCC has already explained:

> We contemplate that sufficient descriptions will convey enough information to enable a customer reasonably to identify and to understand the service for which the customer is being charged. Conversely, descriptions that convey ambiguous or vague

> information, such as, for example, charges identified as "miscellaneous," would not conform to our guideline. *Similarly, in our view, a charge described by what it is not, such as, for example "service not regulated by the Public Service Commission" is inherently ambiguous and does not disclose sufficient information. There is no way for a consumer to discern from this description that the charge refers to, for example, inside wiring maintenance insurance.*

In the Matter of Truth-in-Billing and Billing Format, First Report and Order and Further Notice of Proposed Rulemaking, In the Matter of Truth-In-Billing and Billing Format, 14 F.C.C.R. 7492, at 7517-18 (F.C.C. Apr. 15, 1999) (emphasis added).

Petitioner's practice of billing for WireWatch as "Non-Regulated Services" utilized billing language remarkably similar to FCC's example of an *inadequate* billing description. *See* App. 43–44a (district court noted the "uncanny overlay of the example given by the agency and the facts of this case"). Petitioner itself maintains that it ceased the challenged practice in January 2002, and it is unlikely that telecommunication companies today would employ billing descriptions that are in open defiance of the FCC's admonition. Therefore, a decision by this Court addressing the underlying facts likely would not have a material impact on current or future telecommunication industry billing practices.

III. THE SIXTH CIRCUIT RULING IS NOT IN CONFLICT WITH THE RULINGS OF ANOTHER CIRCUIT.

As the Court of last resort, certiorari may be especially appropriate when "a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter." Sup. Ct. R. 10(a). In a specious effort to invoke this consideration, petitioner asserts that the Sixth Circuit's decision conflicts with the decision in *Conboy v. AT&T Corp.*, 241 F.3d 242 (2d Cir. 2001). Pet. 25-29.

Petitioner mischaracterizes *Conboy* as holding that "liability could not be proven on a class-wide basis." Pet. 25. While *Conboy* was filed as a class action, the issue of class certification was never reached. Instead, the district court dismissed the case pursuant to Fed. R. Civ. P. 12(b)(6), and the Second Circuit affirmed. Thus, *Conboy* was an appeal from a final judgment that was subjected to *de novo* review. 241 F.3d at 246. Even if petitioner's contentions concerning *Conboy's* interpretation of the Communications Act were substantively correct, such a holding on the merits could not be "in conflict" with a decision upholding a district court's exercise of discretion in certifying a class. *See* App. 8a-9a ("The district court maintains substantial discretion in determining whether to certify a class, as it possesses the inherent power to manage and control its own pending litigation.") (citation omitted). Indeed, the Sixth Circuit did not find it necessary to even mention *Conboy* (which is not surprising since *Conboy*

has nothing to do with class certification).[6] Class certification is a procedural matter and Rule 23 does not give "a court any authority to conduct a preliminary inquiry into the merits of a suit in order to determine whether it may be maintained as a class action." *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 177-78 (1974).[7]

In any event, nothing in the Sixth Circuit's opinion suggests a conflict with *Conboy*. There, consumers alleged that AT&T, their long-distance telephone carrier, unlawfully disseminated proprietary customer information in violation of Section 222 of the Communication Act, 47 U.S.C. § 222. In order to establish a claim for damages, plaintiffs first argued that "they have paid AT&T a monthly fee to keep their names, address, and telephone number unlisted." *Conboy v. AT&T Corp.*, 84 F. Supp. 2d 492, 498-99 (S.D.N.Y. 2000). Second, plaintiffs argued that "they have paid AT&T for telephone services which include the privacy protections of the Telecommunications Act." *Id.* at 499. According to plaintiffs, the actions of AT&T deprived them of the value of both of these payments.

The first argument failed because, "as AT&T correctly points out, the fee for non-published service to which plaintiffs refer, is paid to Bell Atlantic, and not

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6. Tellingly, petititoner's opening brief to the Sixth Circuit relegated its discussion of *Conboy* to single footnote.

7. For example, if the district court in *Conboy* had addressed and granted class certification (which it did not) before AT&T prevailed on the merits, procedurally AT&T would have prevailed against a class, rather than just the named plaintiffs.

AT&T." 84 F. Supp. 2d at 499. Bell Atlantic was not a defendant. "[P]laintiffs cannot use their payment to Bell Atlantic for 'non-published service' as the basis for their claim for damages against AT&T, because these payments represent the value of Bell Atlantic's compliance—not AT&T's compliance—with the terms of the 'non-published service' agreement." 241 F.3d at 249. The second argument failed because "plaintiffs did not make monthly payments to AT&T for compliance with the Telecommunications Act; rather, they paid AT&T for long-distance telephone service, which they received." 241 F.3d at 250. In AT&T's bill, "every penny paid to AT&T is accounted for, either in the form of itemized charges, surcharges, or taxes." *Id.* Finally, the Second Circuit upheld the district court's rejection of the alternative argument that damages for "emotional distress and mental anguish" could simply be presumed. 241 F.3d at 250-51; 84 F. Supp. 2d at 499 n. 3.

As the discussion above demonstrates, the key problem for the *Conboy* plaintiffs was that they could not point to a separate line item in their telephone bills reflecting a charge from AT&T for its compliance with privacy requirements. The plaintiffs therefore had to either (1) characterize payments to Bell Atlantic as payment for something that they were deprived of by AT&T, or (2) characterize payments to AT&T as consideration for a Telecommunications Act compliance component, notwithstanding the lawful description of the charges. Respondents here need not engage in such machinations because there is (1) a separate line item charge for "Non-Regulated Services" in their bills, (2) that caused them to pay a specific amount of money, (3) to petitioner. The allegation of specific economic

damages suffered as a consequence of petitioner's violation of the Communications Act is also distinguishable from the "'presumed damages' for emotional distress and mental anguish" (241 F.3d at 249) alleged and rejected in *Conboy*. All class members here incurred economic injury when they paid CenturyTel for the WireWatch unlawfully billed as "Non-Regulated Services."

Accordingly, there is no evident conflict among circuits necessitating immediate resolution by this Court. Petitioner's argument merely stretches some of the reasoning in *Conboy* in an attempt to support its already twice-rejected contentions, which is insufficient grounds to warrant further review.

IV. THE SIXTH CIRCUIT CORRECTLY HELD THAT THE DISTRICT COURT ACTED WITHIN ITS DISCRETION.

Finally, to the extent it may be relevant to this Court's consideration of the petition, respondents respectfully submit that the Sixth Circuit's inquiry into Section 206 requirements is entirely correct. *See* App. 23a-24a. Even if the Sixth Circuit had misapplied the statute in these circumstances, however, "[a] petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." Sup. Ct. R. 10.

There is clearly a causal link between the Section 201(b) violation and consumers' payments to CenturyTel of the amounts so billed for "Non-Regulated Services."

As the Sixth Circuit correctly recognized, the FCC enacted a regulation intended to confirm the meaning of Section 201(b) "so that customers can accurately assess that the services for which they are billed correspond to those that they have requested and received, and that the costs assessed for those services conform to their understanding of the price charged." App. 21a (quoting 47 C.F.R. § 64.2401(b)). When petitioner failed to provide a proper description of its WireWatch charge in its bills, consumers were, at a minimum, unlawfully deprived of the opportunity to: (1) object to the charge as unauthorized and/or withhold payment; (2) cancel the service; or (3) take advantage of the service by making a claim. Payments by consumers of the amounts unlawfully billed for "Non-Regulated Services" are the natural consequences of the billing violation, rendering such payments an injury under Section 206. *Cf. Edwards Industries v. Bell Telephone Company of Nevada*, 74 F.C.C. 2d 322, 328 ¶17 (FCC 1979) ("We believe that the damages claimed by Complainants could be expenses that would flow under these circumstances as natural consequences from the violations which have been alleged and, as such, are recoverable under Section 206 of the Act.").

Petitioner's reliance on the Court's interpretation of causation under RICO, sheds little, if any, light on the proper causation analysis of the Communications Act. Pet. 17-18.[8] The Court has recognized that the

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8. Petitioner asserts that "Section 206, and the Court's decision in *Holmes* [*v. Sec. Investor Protect Corp.*, 503 U.S. 258 (1992)], clearly require proof of causation, which the Sixth Circuit wholly ignored in its assessment of the class certification (Cont'd)

federal statute most analogous to the Communications Act is the Interstate Commerce Act ("ICA"). *Global Crossing Telecommunications, Inc. v. Metrophones Telecommunications, Inc.*, 550 U.S. 45, 127 S.Ct. 1513, 1517 (2007).[9] Courts have therefore held that decisions construing the ICA are persuasive in establishing the meaning of the Communications Act. *Conboy*, 241 F.3d at 250 ("Sections 206 [and] 207 [of the Communications Act] . . . are the present law in sections 8 [and] 9 . . . of the Interstate Commerce Act. . . .") (quoting H.R. Rep. No. 73-1850, at 6 (1934)).

In *Interstate Commerce Commission v. Transcon Lines*, 513 U.S. 138 (1995), for example, the Court upheld the ICC's authority to enjoin the collection of liquidated damages for, among other things, failure to include in billing documents the notice language required by regulation. *See* 513 U.S. at 145 ("To the extent the ICC seeks to enjoin collection of liquidated damages as a remedy for Transcon's lack of notification in the original bills, see 49 C.F.R. § 1320.3(c) (1992), and nonissuance of revised bills within 90 days, see

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(Cont'd)
criteria." Pet. 18. The Sixth Circuit was not alone in ignoring *Holmes*; petitioner never referred to the decision in either of its briefs on appeal or at oral argument. In any event, the Sixth Circuit did expressly consider causation. *See* App. 23a-24a.

9. *See Global Crossing*, 127 S. Ct. at 1517 ("The relevant sections (in both statutes) . . . authorize an injured person to recover 'damages' for an 'unlawful' charge or practice . . .") (citations omitted).

§ 1320.2(g)(2)(vi), this remedy too is appropriate.").

> First, its remedy appears to the ICC, and to us, necessary to the effective enforcement of its regulations. Were we to disallow the injunction, respondents and other trustees of bankrupt carriers would be immune, in effect, from enforcement of the credit regulations . . . .
>
> Second, . . . *the requirements for notice of liquidated damages are to protect shippers from the imposition of penalties without warning. When a carrier fails to provide notice, it is an appropriate remedy for the ICC to bar collection of the liquidated damages, for the remedy serves the regulations' intended beneficiaries.*

513 U.S. at 146-47 (citations omitted; emphasis added). The only charge there that could not be collected was the undisclosed charge for liquidated damages, the filed rate for shipping remained enforceable. *Id.* at 148.

Here, because the truth-in-billing requirements are intended to protect consumers (just like the requirement of notice of liquidated damages in *Transcon* was to protect the shippers), the telecommunications provider — not the consumer — bears the burdens of the violation. If petitioner is permitted to shift the burden of ***its*** billing violation onto its customers —

e.g., by requiring each customer to individually prove he or she did not understand the unlawfully described charge — the truth-in-billing requirements would be meaningless and unenforceable. *Cf. Interstate Commerce Commission v. United States ex rel. Campbell*, 289 U.S. 385, 390 (1933) ("The carrier ought not to be allowed to retain his illegal profit, and the only one who can take it from him is the one that alone was in relation with him, and from whom the carrier took the sum.") (citation omitted) (cited in *Conboy*, 241 F.3d at 250).

Petitioner may, indeed, be entitled to seek a credit or a set-off for various considerations. For example, the district court's order indicated that questions of damages in this case "can be addressed later in the proceedings by means of a special master, representative trials, or other means." App. 56a; *cf. Barnes v. Illinois Bell Tel. Co.*, 1 F.C.C. 2d 1247 ¶ 42 (FCC 1965) ("Although the amount of damages need not be established with precise mathematical accuracy, it must be shown with reasonable certainty and by the best means possible under the circumstances.").

These are important issues that the district judge will have to address as the case progresses toward conclusion. In an appeal following a final judgment, appellate courts will know exactly how the district court handled these issues. Considerations of judicial efficiency, therefore, weigh heavily in favor of allowing this case to progress to a final judgment before expending any further appellate resources.

CONCLUSION

For the reasons set forth above, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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